# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 12, 2002 |
| v | No. 229484<br>Saginaw Circuit Court |
| ANTUAN MONTRELL McFADDEN,<br><br>Defendant-Appellant. | LC No. 00-018431-FH |

Before: Bandstra, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial, of second-degree home invasion, MCL 750.110a(3), attempted first-degree home invasion, MCL 750.110a(2), carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. In addition to the mandatory consecutive two-year term of imprisonment for his felony-firearm conviction, the trial court sentenced defendant, a second habitual offender, to concurrent terms of 3 to 22 ½ years' imprisonment for the second-degree home invasion conviction and 2 to 7 ½ years' imprisonment each for the attempted first-degree home invasion, carrying a concealed weapon, and felon in possession convictions. We affirm.

We first address defendant's claim that the trial court erred in instructing the jury regarding the element of "possession" to support a felony-firearm conviction.[1] In a related argument, defendant argues that defense counsel was ineffective in agreeing to the trial court's instruction. Because defendant did not raise a timely objection to the instructions, we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[1] Although in his statement of questions presented defendant challenges the propriety of the trial court's instruction as it related to each of the "charged gun offenses," he has restricted his argument on appeal to the instruction's effect on the jury's deliberation concerning the felony-firearm charge. Accordingly, we do not address the propriety of the instruction as it concerns defendant's convictions of carrying a concealed weapon and felon in possession of a firearm. See *People v Anderson*, 209 Mich App 527, 538; 531 NW2d 780 (1995) (issues raised but not briefed on appeal are considered abandoned).

This Court reviews de novo a claim alleging ineffective assistance of counsel. *People v Toma*, 462 Mich 281, 310; 613 NW2d 694 (2000). To establish ineffective assistance of counsel, a defendant must affirmatively show that his attorney's performance was deficient under an objective standard of reasonableness and that the deficiency likely affected the outcome of the case. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999); *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). As defendant concedes in his brief on appeal, he did not preserve the ineffective assistance of counsel argument in the lower court. Therefore, our review is limited to errors apparent from the existing record. *People v Knapp*, 248 Mich App 361, 385; 624 NW2d 227 (2001).

After the jury began its deliberations it requested additional instruction regarding the concept of "possession" as that term related to the charges stemming from the gun found in defendant's vehicle. Specifically, the jury inquired whether defendant could be considered to have possessed the gun if the gun was inside the car while defendant was outside of the vehicle.[2] In response, and with the express approval of the prosecutor and defense counsel, the trial court instructed the jury with a modified version of CJI2d 12.7, which defines "possession" for purposes of crimes involving controlled substances.[3]

A conviction for felony-firearm requires proof beyond a reasonable doubt that the defendant possessed or carried a firearm, and that he did so during the commission or attempted commission of a felony. MCL 750.227b(1); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Consistent with these requirements, the trial court instructed the jurors that to convict defendant of felony-firearm, they must conclude beyond a reasonable doubt that "defendant committed or attempted to commit the crime of home invasion second degree or home invasion first degree . . . [and] that at the time the defendant committed or attempted to commit [the] crime[s], he knowingly possessed or carried a firearm."[4]

In *People v Burgenmeyer*, 461 Mich 431, 439; 606 NW2d 645 (2000), our Supreme Court had occasion to consider the requirement of possession as it relates to the offense of felony-firearm. In *Burgenmeyer, supra* at 433-434, the defendant was convicted of possessing between 50 and 225 grams of cocaine, felony-firearm, and maintaining a house from which drugs were sold. Our Supreme Court granted the defendant's delayed application for leave, ordering the parties to address whether the prosecutor presented sufficient evidence to support the felony-firearm conviction.

---

[2] Defendant argues, and we agree, that although the jury did not clarify to which charge it was referring when making this inquiry, it is apparent that the jury was inquiring whether it could find "possession," and therefore convict defendant of felony-firearm, if the gun was in the car at the time the charged home invasions took place.

[3] Although defendant also argues that the trial court itself erred in giving this instruction, because defense counsel affirmatively stipulated to the instruction, any error on the part of the trial court is waived, absent a showing of ineffective assistance of counsel. See *People v Carter*, 462 Mich 206, 214-215, 218; 612 NW2d 144 (2000).

[4] Although the offense of felon in possession of a firearm was also charged as a predicate offense for the felony-firearm charge, the jury was not instructed that it could base a finding of guilt of the felony-firearm charge on the felon in possession count.

Affirming the defendant's convictions, the *Burgenmeyer* Court cited with approval its earlier decision in *People v Hill*, 433 Mich 464, 470-471; 446 NW2d 140 (1989), where it held that both actual and constructive possession for purposes of the felony-firearm statute require "proximity and reasonable accessibility." The Supreme Court also quoted with approval the following portion of this Court's holding in *People v Williams*, 212 Mich App 607; 538 NW2d 89 (1995), overruled in part 461 Mich 131 (2000):

> [w]ith respect to the element of possession, defendant argues that, for purposes of the felony-firearm statute, a person away from home cannot be deemed in possession of a firearm found in his house. We agree. Possession may be actual or constructive, and may be proved by circumstantial evidence. [*Hill, supra* at 469-471.] *A defendant may have constructive possession of a firearm if its location is known to the defendant and if it is reasonably accessible to him*. *Id.* at 470-471. . . . Punishing a defendant for possession of a firearm that is not accessible or at his disposal, as opposed to being under less immediate dominion or control, does not fulfill the purpose of the felony-firearm statute. Accordingly, the possession requirement of the felony-firearm statute has been described in terms of ready accessibility. See, e.g., *People v Becoats*, 181 Mich App 722, 726; 449 NW2d 687 (1989); *People v Terry*, 124 Mich App 656, 661; 335 NW2d 116 (1983), citing *People v Davis*, 101 Mich App 198, 203, n 2; 300 NW2d 497 (1980). Such accessibility does not exist where, as here, a defendant is far away from the location of the firearm.[5] [Emphasis supplied.]

The *Burgenmeyer* Court also expressly approved of the following holding from *Hill*, *supra* at 470-471.

> Michigan courts have recognized that the term "possession" includes both actual and constructive possession. As with the federal rule, a person has constructive possession if there is proximity to the article together with indicia of control. *People v Davis*, 101 Mich App 198; 300 NW2d 497 (1980). *Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant. Physical possession is not necessary as long as the defendant has constructive possession. People v Terry*, 124 Mich App 656; 335 NW2d 116 (1983). [*Burgenmeyer, supra* at 438 (emphasis supplied).]

In *Burgenmeyer*, the unanimous Supreme Court also observed that the above rulings from *Williams* and *Hill* "are sound insofar as they remind [the Court] that possession of a weapon is not the same thing as ownership of a weapon." *Burgenmeyer, supra* at 438. The Court clarified that the felony-firearm statute does not criminalize mere ownership of a firearm. *Id.* at 436. However, the *Burgenmeyer* Court went on to express its disapproval and overrule the portion of

---

[5] In *Williams*, *supra* at 608, the defendant was convicted of possession of between 225 and 649 grams of cocaine and felony-firearm. During a search of the defendant's home, the police found cocaine locked in a file cabinet in the defendant's bedroom closet and a firearm in a dresser next to the closet. The defendant was not home at the time of the search. *Id.*

the *Williams* decision that focused on the possession of the firearm at the time of a police raid, rather than at the time of the commission of the underlying felony offense. *Burgenmeyer, supra* at 438. Indeed, the Court held in *Burgenmeyer, supra* at 439, "[t]he proper question in *Williams* – and in the case before us today – is whether the defendant possessed a firearm *at the time he committed a felony*. That fact that the defendant did not possess a firearm at the time of arrest, or at the time of the police raid, is not relevant in the circumstances of this case." [Emphasis in original.]

> Thus, a person does not violate MCL 750.227b by committing a felony while merely owning a firearm. To be guilty of felony-firearm, one must *carry* or *possess* the firearm, and must do so *when* committing or attempting to commit a felony. [*Burgenmeyer, supra* at 438 (emphasis in original).]

After reviewing the trial court's instructions as a whole to determine whether they sufficiently protected defendant's rights, *People v McCrady*, 244 Mich App 27, 30; 624 NW2d 761 (2000); *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995), we are not persuaded by defendant's assertion that error occurred to the extent that reversal is warranted. As noted above, to satisfy the possession element of felony-firearm, a defendant must have actual or constructive possession of the firearm at the time he committed the felony. A defendant has constructive possession of a firearm for purposes of the felony-firearm statute "if its location is known to the defendant and if it is reasonably accessible to him." *Burgenmeyer, supra* at 437. Although phrased in different terms, we are satisfied that the trial court's instruction to the jury regarding constructive possession adequately articulated these requirements and did not amount to error. Similarly, defense counsel's decision to not object to this instruction did not amount to ineffective assistance of counsel, given that he was not required to raise a meritless objection. *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

Further, we do not agree with defendant that the record evidence, viewed in the light most favorable to the prosecutor, would not warrant a reasonable juror in finding defendant guilty of felony-firearm beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). In particular, there was circumstantial evidence establishing that defendant had constructive possession of the firearm when he committed second-degree home invasion and attempted first-degree home invasion. In other words, the record evidence, viewed in the light most favorable to the prosecutor, was sufficient to allow the jury to infer that defendant was aware of the firearm's location, and that he had reasonable access to it while committing the underlying felonies.

Specifically, the police stopped defendant and his companion in their vehicle minutes after they attempted to break into the second home as they were stopped at a red light. A search of the vehicle revealed a .38 caliber Smith and Wesson six-shot revolver containing three live rounds under the front passenger seat. In addition, defendant was carrying seven .38 caliber bullets in his left coat pocket. Moreover, after being advised of his *Miranda*[6] rights, defendant gave a detailed statement to the police. In the statement, defendant admitted that he and his companion broke into one home and stole a Nintendo 64 game system as well as a VCR.

---

[6] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant also admitted attempting to break into the second home by pulling the screen off of the door, but decided against it after he saw an alarm sticker on the door. Defendant also acknowledged that it was his car that he and his companion were driving that night, and that he was well aware that his companion was carrying a firearm.

Although defendant recounted that the firearm was left in the vehicle while he and his companion burglarized the first home and attempted to break into the second, we are of the view that the circumstantial evidence, viewed in a light most favorable to the prosecutor, established that defendant was aware of the gun's location, and that it was readily accessible to him as he committed these crimes. During trial the victim of the attempted first-degree home invasion testified that a young black male knocked on her door shortly before the attempted home invasion, but after she refused to open the door, the person, whose car was parked in the driveway, drove away. Moments later the victim heard someone attempting to enter through her back door, and after she called 911, she observed the same car she had seen earlier parked in her driveway driving north one block up from her home. The police apprehended defendant a short distance away and discovered the gun in his car and after a search at the police department found live bullets in his pocket. On this record, we are satisfied that sufficient evidence was presented to sustain defendant's felony-firearm conviction.

Likewise, we reject defendant's claim that reversal of his conviction of felon in possession of a firearm is required as a result of the trial court's failure to sua sponte instruct the jury regarding the limited use it could make of testimony concerning defendant's prior felony conviction.[7] Our Supreme Court has declined to impose upon the trial court a sua sponte duty to give such limiting instructions, noting that defense counsel may not request such an instruction because it might be counterproductive to emphasize the prior acts to the jury. *People v DerMartzex*, 390 Mich 410, 416-417; 213 NW2d 97 (1973). Accordingly, it was not error for the trial court to fail to give such an instruction absent a request.

Moreover, because defense counsel may well have concluded, as a matter of trial strategy, see *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999), that it would be counterproductive to emphasize the prior conviction, we similarly reject defendant's claim that defense counsel's failure to request such instruction constituted ineffective assistance warranting reversal of this conviction. *DerMartzex*, *supra* at 416. Further, although we agree that in the absence of such a request to instruct, a stipulation to the prior felony as an element of the charge of felon in possession of a firearm may have been prudent, see *People v Green*, 228 Mich App 684, 691-692; 580 NW2d 444 (1998), we note that in order to establish ineffective assistance defendant must affirmatively show that counsel's performance was both deficient and prejudicial. *Hoag*, *supra*. Because evidence of defendant's guilt on this charge was uncontested, however, defendant cannot meet this burden. See, e.g., *People v Launsburry*, 217 Mich App 358, 362; 551 NW2d 460 (1996). Indeed, in his statement to police following arrest, defendant acknowledged that he knowingly transported the gun found in his vehicle in spite of his knowledge that it was a violation of his probation from the prior felony offense. Moreover,

---

[7] According to the record, including defendant's candid statement to the police, his prior conviction of discharge of a firearm from a motor vehicle, MCL 750.234a, stemmed from his involvement as the driver in a drive-by shooting in 1996.

although admitted into evidence during the testimony of defendant's probation officer, the nature of defendant's prior conviction was not again referenced by either party. Thus, we do not believe that the challenged testimony prejudiced defendant to the extent that it altered the jury's verdict with respect to the felon in possession charge.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell